

BUS AND TRUCK LAW: Prosecutions for violation of sub-division (c) Sec. 5270, Laws of Mo. 1931 in county where acceptance was made.

September 19, 1933.



Hon. M. E. Montgomery,
Prosecuting Attorney,
Scott County,
Benton, Missouri.

Dear Sir:

This department acknowledges receipt of your letter relating to subdivision (c) of Sec. 5270, Laws of Missouri 1931, p. 309, in which you inquire as follows:

"Subdivision 'C' of Section 5270 of the trucking laws, shown at page 310 of the 1931 Session Acts, makes it a misdemeanor for a 'contract hauler to accept persons or property for transportation from a point on a regular route to a point on a regular route.

Section 5979 (5279), at page 316 of said Act, provides that a suit may be brought against any contract hauler in any county where the cause of action arises, or where such carrier operates or maintains an office or agent, but this last Section seems only to apply to civil suits.

I would like to have your opinion as to whether or not a licensed contract hauler, who accepts property in St. Louis, Missouri, at a point on a regular route for transportation to a point on a regular route in this (Scott) County, and transports and delivers same in this county at such point, is subject to prosecution in this county, or only in St. Louis, where the merchandise was accepted for transportation.

In other words, is the acceptance of merchandise for transportation the offense, or is the transportation and delivery also an offense? And, is the jurisdiction of the

prosecution only in the county where the acceptance was made, or may the offender be prosecuted in any county in which he transports the merchandise or makes a delivery?

Section 3378 to 3380 provides that embezzlement, larceny and murder may be prosecuted in more than one county under certain circumstances, but I can find no authority for the prosecution of a contract hauler in this county, where the merchandise was not accepted in this county.

If you conclude that the prosecution in such cases may be had in Scott County, I would appreciate you advising me of the proper wording for the charging part of my information in prosecutions of this sort."

The situation presented in your letter differs from what we term "continual offense" in that several special sections in Missouri governing the venue in particular instances are not applicable in the case under consideration. The circumstances governing the venue and general rule in criminal cases is set out in Wharton's Criminal Law, Vol. I (12th Ed.), p. 434, Sec. 334, as follows:

"Conflicts of jurisdiction also arise when an offense is begun in one country to take effect in another. Supposing a libelous or forged writing be mailed in one place to be published in another, or an explosive package be expressed in one place to be opened in another, or a gun shot in one place and the shot takes effect in another, which is the place of the commission of the offense? Arguing by analogy from the law which makes the place of performance the seat of a contract, it might be said that the place of consummation is the peculiar seat of the crime. So, in fact, under the common law, it has frequently been decided, though it is settled that a concurrent jurisdiction exists in the place of starting the offense, supposing that the offense is indictable in the place of consummation. The same distinctions apply to obtaining goods by false pretenses by letter. As has already been seen, attempts to commit crimes are cognizable in the place of the attempt,

and such, also, is the case with conspiracies, and accessoryships. But there can be no question that all parties concerned are also responsible at the place where the offense is consummated. The mere fact, however, that a forged check has been drawn on a Kansas bank, does not give Kansas jurisdiction when the check was drawn and paid in Missouri.

Since, however, a crime may be organized in one country, advanced in a second, and executed in a third, it is necessary to conceive of the crime in question as broken up into several sections, committed in distant jurisdictions, and severally cognizable in each. That such is the case is the opinion of several eminent jurists, and such would, no doubt (e.g. under indictments for treason or conspiracy, where every overt act would give the local court jurisdiction), under similar circumstances, be the practice of the English common law. And the same reasoning applies to all offenses which are carried on in two or more jurisdictions. At the same time it must be kept in mind that an attempt to commit in a foreign state an act lawful in such state, though unlawful in the domestic state, may not be punishable in the latter state."

In the case of State v. Mispagel, 207 Mo.557, l.c. 578-79-80-81, the case being one of embezzlement in which there is a special statute governing the venue, several general principles of law are contained. We quote as follows:

"Having reached the conclusion as heretofore indicated, that the actual conversion of the money charged in the information as shown by the evidence in this case, occurred in the city of St. Louis, and that such act of conversion was done in said city by and through the defendant's authorized agent, we are next confronted with the exceedingly interesting as well as important proposition in this case as to where the venue of the commission of the offense by the defendant should be laid. The record sharply presents the question as to whether the embezzlement of the money as charged in the information should have been charged to have occurred in the city of St. Louis

or in St. Charles county. Defendant's place of employment was in St. Charles county and it must be conceded that it can be reasonably inferred that the criminal intent was formed in St. Charles county, but the criminal act of conversion was in the city of St. Louis. Ordinarily the venue would be in the city of St. Louis. To illustrate: If I form an intent while in Cole county to steal a horse, which I know I can find in Callaway County, and pursuant to that intent cross the river, and actually steal the horse, the crime is complete in Callaway county, and that is the only jurisdiction for prosecution, unless I take the stolen animal to some other county, where, by force of our statute, I may be prosecuted elsewhere.

The learned Attorney-General representing the State insists that in the case at bar there are two jurisdictions and the State may elect, as it has in this case. It is manifest that the defendant, Mispagel, did not convert any money of the St. Charles Savings Bank which he had in his possession in St. Charles county. Directing our attention to the proposition urged by the State that in this case there was jurisdiction either in the county of St. Charles or in the city of St. Louis, we will say at the very inception of the consideration of that question that the evidence shows the existence of the relation of bank and cashier, and the by-laws, which were introduced in evidence, gave the cashier of this bank, who was the defendant, the right to exercise certain powers and imposed upon him certain duties which are ordinarily performed by cashiers of banks, without specifically mentioning what the powers or duties are. The defendant had to account for the moneys and other property received by him belonging to the bank, and presumably at the place of business of said bank, and it is urged by the State that, having formed the intent in St. Charles county, and having to account for the money to his employers in said county, this conferred jurisdiction upon the circuit court of St. Charles county, notwithstanding the fact that the actual money was both received and converted in the city of St. Louis, and we frankly confess that this contention is not wholly without some weight. It must, however, be observed that our statute does not make a failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund, and while failure to account for such fund may constitute very material evidence tending to

establish the act of conversion, yet the failure to account by no means constitutes the offense of embezzlement of the fund.

In Works on Courts and Their Jurisdiction, page 471, it is announced that the general rule is that where no statute on the subject prevails, the jurisdiction exists where the crime is consummated or completed. In this State we have no special statute fixing jurisdiction in embezzlement cases. 'At common law an indictment can be found in that county only in which the crime has been committed.' (12 Cyc. 229) In the same volume and on the same page of the Cyclopedia above cited, the American rule as applicable to this subject is thus stated: 'In the United States most of the State constitutions and declarations of rights expressly provide in substance that all criminal prosecutions shall be brought to trial in the county in which the crime shall have been committed. These provisions are strictly construed in favor of the accused, and with a recognition of the principles of the common law, and the Legislature cannot authorize a trial in any other county.'

This court has announced in no uncertain or doubtful terms the rule that the Legislature cannot under our statute arbitrarily place the jurisdiction of a criminal cause in a county other than the county in which the offense was committed, and it has been expressly ruled by this court that where the lawmaking power undertakes to indicate and enforce such laws it is the province of the court to declare them unconstitutional and void. (State v. Smiley, 98 Mo. l.c. 607-608, and cases cited; State v. Hatch, 91 Mo. 568; State v. Anderson, 191 Mo. 134).'"

Under the above decision and definitions, we would have no hesitancy in saying that the venue, in the facts as you present, could be in either St. Louis County or Scott County; but the language of the statute is "from a point on a regular route destined to a point on a regular route". It would, therefore, appear that as soon as the contract hauler had made the contract he would be subject to prosecution solely in the county in which the contract was made. However, we do not believe that the crime would then be complete, as there would be no overt act; but if he should accept the merchandise and start to transport the same, the crime would be complete, or at least he could be prosecuted for an attempt, and the venue in that instance could in no wise be in Scott County, because no part of the crime had been committed within the borders of Scott County.

We interpret Sec. 3377, R.S. Mo. 1929, same being as follows:

"Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law,"

to mean that if the crime is committed and is complete in a county, then, of course, the venue must necessarily be in that county, and likewise, under the general rule set out in C.J., Sec. 260:

"Generally speaking, it is a fundamental rule in criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed and in all criminal prosecutions in the absence of statutory provision to the contrary the venue must be laid in the county or district of the offense and must be proved as laid."

Referring again to the word "destined", as used in the statute, if the Legislature had seen fit to omit the word and insert the words "transported to a point on a regular route", then, even under the decision above quoted, we could readily see that the venue could be either in St. Louis County or Scott County. But let us, for the sake or argument, under the section in question, have the contract hauler accept the merchandise destined from a point on a regular route to a point on a regular route, and the transportation be carried to a conclusion, i.e., the merchandise be deposited in your county. It is then possible that part of the crime has occurred in your county, but under the decision in the Mispagel Case, supra, bearing in mind that there is a special section relating to the venue in embezzlement cases, it was held that the venue was in St. Louis instead of St. Charles County.

It is therefore the opinion of this department that the crime would be complete at the time the contract hauler accepted the merchandise destined from a point on a regular route to another point on a regular route, and that the mere fact that the contract hauler was not arrested until he had deposited the merchandise in your county would not in itself place the venue also in your county.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY MCKITTRICK,
Attorney General